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NO. 83-1823

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * * * * * *

GEORGE W. STRAKE, JR.,

Appellant,

v.

A.M. SEAMON, ET AL.,

Appellees.

* * * * * * *

On Appeal From The United States District Court
For The Eastern District of Texas

* * * * * * *

MOTION TO DISMISS OR AFFIRM

* * * * * * *

JIM MATTOX
Attorney General of Texas

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Executive Assistant
Attorney General

Attorneys for Appellees

BEST AVAILABLE COPY

SUMMARY OF THE ARGUMENT

I.

By his First Question, Appellant asks this Court to find that a legislatively created redistricting plan that maintains established minority voting strength in two congressional districts rather than concentrating minorities in one district violates both the Voting Rights Act and the Constitution. Based on a factual review of the totality of the circumstances, the three-judge court below concluded that the legislative plan did not exclude minorities from the electoral process in violation of either the Voting Rights Act or the Constitution. Appellant does not allege that this factual conclusion was either clearly erroneous or the result of a misapplication of the law. Instead, Appellant seeks independent factual review and reweighing of the evidence by this Court. Such a review is prohibited by Rule 52(a) of the Federal Rules of Civil Procedure. Further, the First Question does not present a substantial legal issue.

II.

By his Second Question, Appellant asks this Court to find that the legislatively created redistricting plan violates the voting rights of Republicans under the Constitution. This claim was not presented below. It was never identified as an issue at the pretrial conference, and was not the subject of evidence introduced at trial or a final judgment of the three-judge court. As such, this Court lacks jurisdiction to hear this claim on appeal for the first time. Even if this Court has jurisdiction, the longstanding policy of this Court is to retain from hearing claims not fully presented below.

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GEORGE W. STRAKE, JR.,

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v.

A.M. SEAMON, ET AL.,

Appellees,

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On Appeal From The United States District Court
For The Eastern District of Texas

* * * * * * * *

MOTION TO DISMISS OR AFFIRM

* * * * * * * *

Appellees Mark White, Governor of the State of Texas, and John Fainter, Secretary of State of the State of Texas respectfully pray that this Court dismiss this appeal for lack of jurisdiction and, in the alternative, that this Court affirm the judgment of the United States District Court for the Eastern District of Texas entered on February 13, 1984 on grounds that the appeal of said judgment does not present this Court with a substantial question.

STATEMENT OF THE CASE

This is a voting rights case brought under 42 U.S.C. § 1973 and the Fourteenth Amendment challenging the Texas Legislature's 1983 redistricting of the State's congressional districts. Only two congressional districts, Districts 5 and 24 in Dallas County, are involved in this appeal.

In 1981, the Texas Legislature enacted Senate Bill 1 (S.B.1), dividing the State into twenty-seven congressional districts. Under S.B.1, Dallas minority groups were concentrated or "packed" into District 24 where they comprised a majority of the population but less than a majority of the registered voters. In District 5, they comprised a mere 10.11 percent of the voting age population. This was a dramatic change from the historical configuration of these two districts under which minorities had been more evenly distributed between the two districts.

S.B.1 was challenged from various direction; one claim was from minorities attacking the loss of total voting strength in two districts that resulted from the "packing" of minority population into a single district. Following Justice Department refusal to preclear S.B.1, the three-judge court entered an interim plan redistributing minority voting strength to both districts. This interim plan was appealed to the Supreme Court by Defendants, who won a remand.

Subsequent litigation over S.B.1 effectively became mooted in 1983 when the Texas Legislature enacted a second congressional redistricting plan, Senate Bill 480 (S.B.480). S.B.480 modified two South Texas congressional districts to address minority concerns in District 23 and adopted essentially the Court's interim order in Dallas Districts 5 and 24, as well as the Court's plan for Districts 15 and 27 in the Gulf Coast area. On September 27, 1983, the United States Department of Justice precleared S.B.480.[1]

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[1] In preclearing S.B.480, the Attorney General stated that "Our analysis is that minorities in Dallas County have participated freely and sometimes decisively in congressional elections... We have found no evidence that in selecting from among the virtually infinite proper options, the legislative judgment was infected by a racial or ethnic motive. Nor were we able to conclude that S.B.480 ... is in any meaningful respect retrogressive. Accordingly, the state has met the burden imposed by the Voting Rights Act with respect to the Dallas Districts," *See* Appendix A.

Following enactment and preclearance of S.B.480, Appellant George Strake, Jr., State Chairman of the Republican Party of Texas, was substituted for the prior party chairman, Chester Upham, Jr. A realignment of the parties also followed, leaving Strake as a Plaintiff. By a pleading filed by Strake in October 1983, Strake challenged S.B.480 on behalf of minority voters in congressional Districts 5 and 24. The pleading filed by Strake made *no claim on behalf of Republican voters.* After a full evidentiary hearing before the three-judge court, a majority of the Court issued an opinion and judgment upholding the configuration of Districts 5 and 24 under S.B.480. In its opinion the court majority found no evidence of unequal access to the political process, finding instead that "the evidence presented to us demonstrates that minority voters exert a significant impact in Districts 5 and 24, play pivotal roles in key elections, and are capable of selecting responsive, sensitive candidates of their choice." Jurisdictional Statement at A-1-14 — A-1-15. Based on the dissenting opinion of the third judge, Appellant sought, but was denied, a motion for rehearing or new trial.

INTRODUCTION

In 1983, the Texas Legislature enacted S.B.480, which redistricted Dallas County congressional districts such that minority voters retained significant influence in two congressional districts rather than being concentrated or "packed" into a single congressional district. Based on a review of a totality of the factual circumstances, the three-judge court concluded that there has been neither intentional racial discrimination nor abridgment of minority voting rights. Appellant now asks this Court to focus on the single fact that minority voters could have constituted a population majority[2] in a packed district, and, on that basis, to reverse the three-judge court. To do so, this Court would have to abandon two well-established principles.

First, it would have to ignore the trial court's factual findings and substitute its own reweighing of the evidence in violation of the clearly erroneous rule embodied in Rule 52(a) of the Federal Rules of Civil Procedure. Second, it would have to abandon the well-established rule that voting rights cases are to be

[2]This "majority" was not a voting majority. Minority voters, blacks and Hispanics combined, constituted less than half of the proposed district's registered voters.

evaluated based on the totality of the circumstances rather than on a single factor.

Appellant also claims that the legislative redistricting plan is a result of intentional discrimination against Republicans. This is a claim not previously presented during this extended litigation. Consequently, this Court lacks the jurisdiction to hear the claim for the first time on appeal. Even if this Court has jurisdiction, review of a distinct cause of action raised for the first time on appeal would violate the long-standing practice of this Court of declining to hear issues not raised and fully presented below.

THE FIRST QUESTION

1. Appellant Seeks a Facutal Review and Reweighing of the Evidence that is Prohibited by Rule 52(a) of the Federal Rules of Civil Procedure.

By his First Question, Appellant asks this Court to determine that, contrary to the finding of the three-judge court below, the Congressional redistricting plan adopted by the Texas legislature and precleared by the Department of Justice[3] had both the purpose and effect of discriminating against minority voters. Appellant does not directly challenge either the accuracy or sufficiency of the district court's factual findings. Instead, what Appellant seeks is an independent factual review and reweighing of the evidence by this Court. As this Court has indicated on numerous occasions, such an independent factual review and reweighing is prohibited by Rule 52 of the Federal Rules of Civil Procedure.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is a legal prohibition against any voting practice that "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color..." The factual showing necessary to prevail on a Section 2 claim is expressly stated in the statute: a plaintiff must show that "based on the totality of circumstances, it is shown that the political processes

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[3] A copy of the Department of Justice's preclearance letter is attached as Appendix A.

leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

To prevail on a Fourteenth Amendment claim of racial discrimination, a Plaintiff has the more difficult burden of showing intentional racial discrimination. *See, Rogers v. Herman Lodge*, 458 U.S. 613, 102 S.Ct. 3272, 2385 (1982). However, the same totality of factual circumstances considered in a Section 2 case may provide an evidentiary basis from which to infer the intent necessary in a Fourteenth Amendment violation. *Id.* at 623-27, 102 S.Ct. at 3279-81.

When the fact-finding process in a voting rights case is complete, a district court's factual conclusions must be reviewed under the "clearly erroneous" standard of Rule 52(a). An appellate court may not reweigh the facts, nor substitute its judgment for the judgment of the district court unless, based on the entire record, the court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541 (1948).

This limitation on unrestrained factual review by an appellate court is the rule that controls this appeal. The three-judge court's determination that, for Fourteenth Amendment purposes, there had been no intentional discrimination, and that, for Section 2 purposes, minorities had not been blocked from participating in the electoral process are factual findings subject to the clearly erroneous rule. "Treating issues of intent as factual matters for the trier of fact is common place." *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1790 (1982). Similarly, the evidentiary showing of exclusion from the electoral process specifically required by subsection (b) of Section 2 is a factual matter to be reviewed under the clearly erroneous standard. It is essentially the same factual showing required by this Court in *White v. Regester*, where the Court twice deferred to the district court's factfinding, noting that there was no reason to disturb the findings and conclusions of

the lower court. 412 U.S. 755, 767, 769, 93 S.Ct. 2332. 2340, 2341 (1973). Nothing about the codification of this evidentiary burden as part of the amended Section 2 has transformed its inherently factual nature.[4]

Moreover, the three-judge court's findings of no racially discriminatory intent and equal access to participation in the electoral system are not subject to more detailed appellate review simply because they may be denominated findings of "ultimate fact." As *Pullman Standard, supra*, makes quite clear, Rule 52 "does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." ____ U.S. at ____, 102 S.Ct. at 1789. In the absence of any allegation in Appellant's Jurisdictional Statement that the factual findings in this case are clearly erroneous, the three-judge court's factual conclusions must remain undisturbed, even if they are considered to be "ultimate" factual conclusions.

The deference compelled by Rule 52 to a trial court's factual findings is especially appropriate in voting rights cases. Because a trial court must make a decision based on a totality of the circumstances, the court must conduct "an intensely local appraisal of the design and impact ... (of the voting practice) in the light of past and present reality, political and otherwise." *White v. Regester, supra*, 412 U.S. at 770, 93 S.Ct. at 2341. In recognition of the factual detail involved in such an inquiry, this Court, has *repeatedly* refrained from upsetting the factual findings of lower courts in voting rights cases.

White v. Regester, is the best example of the level of review required by Rule 52 in a voting rights case. The three-judge court's conclusion there was based on the same factual question raised by a Section 2 claim: whether the "political processes

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[4]Under the holding in *Herman Lodge*, factual circumstances demonstrating unequal opportunity to participate in the electoral process are subsidiary facts that may support an ultimate factual conclusion of intentional discrimination in a Fourteenth Amendment claim. 458 U.S. at 624, 102 S.Ct. at 3279. Thus, any determination about the presence or absence of equal access is unquestionably factual in nature and subject to the clearly erroneous standard. *Id.* at 623, 102 at 3278 (clearly erroneous standard applies to trial court's subsidiary findings of fact).

leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S. at 766, 93 S.Ct. at 2339. The trial court's factual finding that there had not been equal opportunity to participate was held sufficient to sustain the district court's judgment.

Regester's deference to factual findings followed the same practice established in *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603 (1964), which presented this Court with much the same type of request for factual review as presented by Appellant in this case. Plaintiffs-Appellants were minorities challenging a legislative decision to concentrate minority voters in three congressional districts rather than disperse them more evenly through an additional, fourth congressional district. This court accepted the three-judge panel's factual conclusion of no discrimination, recognizing the right of the fact finder "to choose among disputed inferences." 376 U.S. at 57, 84 S.Ct. at 605.

More recently, in *Rogers v. Herman Lodge,* this Court again limited the scope of its review of ultimate facts in a voting rights case. A district court had dismantled an at-large voting system and replaced it with a single-member district system. The Court of Appeals sustained the District Court's finding of intentional discrimination on the specific ground that it was not clearly erroneous. 454 U.S 626, 102 S.Ct. at 3275. This Court affirmed, declining to overturn factual findings not found to be clearly erroneous. *Id.* at 622-23, 102 S.Ct. at 3278-79, (citing *Pullman-Standard, supra*).

The three-judge panel in this case conducted the necessarily intensive factual review of history and local practice commanded by *Regester.* Among the factual circumstances considered were:

1. Election returns that indicated the continuing exercise by minorities of "swing vote" influence in *both* contested congressional districts. Jurisdictional Statement at A-1-15;

2. The existence of historical and natural boundaries. *Id.* at A-1-19, n.3; *Seamon v. Upham*, 536 F. Supp. 931, 956 (E.D. Tex. 1982);

3. Population figures, with special attention to the difference between voting age population statistics and general population statistics. Jurisdictional Statement at A-1-19, n.3; at *Seamon, supra*, 536 F.Supp. at 956, n.39;

4. Legislative concern for preserving incumbencies. Jurisdictional Statement at A-1-13;

5. Responsiveness of elected officials to minority needs. *Id.* at A-1-16; and

6. Polarized voting. *Id.* at A-1-19, n.4.

Additionally, the Court relied upon testimony from witnesses, including the testimony from Mr. Lee Jackson, the only witness presented by Appellant at trial. Mr. Jackson conceded that election returns established that minority voters can swing elections in both districts at issue. Jurisdictional Statement at A-1-15.

Based on subtantial evidence, the three-judge court concluded that neither Section 2 nor the Fourteenth Amendment had been violated. In the absence of any allegation that these factual conclusions were clearly erroneous or the result of an incorrect application of the law, Appellants are not now entitled to a reweighing and reevaluation by this Court of the same facts relied upon below.

2. The Appeal Does Not Present a Substantial Legal Issue.

Appellant has failed to present a substantial legal issue for determination by this Court. Appellant does not contend that the three-judge court misapplied a standard of law. *Cf., Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980). His appeal is based instead on his own *preference* for a congressional redistricting plan in which minorities are "packed" into one district, rather than left in two districts, in both of which the Court found

they played an active, *even decisive*, role in elections. Appellant attempts to evade the restrictions on factual review by treating the Texas Legislature's failure to maximize minority population in a single district at if it were a *per se* violation. It is not.

Attempts to create a single "safe" minority district may require dilution of minority voting strength in surrounding districts to the point that minorities remaining in the surrounding districts may be ignored with impunity by elected officials. *See, Taylor v. McKeithen*, 499 F.2d 893, 902 (5th Cir. 1974).[5] Consequently there is no agreement among courts, nor for that matter among minorities, on whether minority groups are best served by concentrating them in a single district they will dominate or by dispersing them through a number of districts where they will continue to exert their influence more broadly. *Id.* at A-1-12. Taken as a single factor, geographic distribution cannot by itself establish either the presence or absence of discriminatory intent or unequal access to the political electoral system. It must be considered in light of all the factual circumstances.

When so considered, the three-judge court found that "minority voters exert a significant impact in Districts 5 and 24, play pivotal roles in key elections, and are capable of selecting responsive, sensitive candidates of their choice." *Id*, at A-1-14 — A-1-15. In the absence of a finding that minorities have been "fenced out" of the electoral process, legislative preference for creating two minority "impact" districts rather than creating one arguably safe district at the expense of minorities remaining in the second district does not by itself present a substantial legal question.

Appellant's failure to bring forward any substantial claim of

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[5] As the Fifth Circuit noted in *United States v. Board of Supervisors of Forest County*, 571 F.2d 951, 956 (5th Cir. 1978), a racially gerrymandered plan "which would assure that blacks form a sizable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations of the black electorate." Appellant did not contest that creating a safe district in one of two districts would result in substantial dilution of minority strength in the remaining district. *See*, Jurisdictional Statement at A-1-12, n. 5.

legal errors leaves nothing but factual review for this Court. But, as noted, factual review must take place under the clearly erroneous rule and Appellant has not even claimed factual error. Thus, the First Question presents neither a substantial legal nor factual issue.

THE SECOND QUESTION

1. This Court Does Not Have Jurisdiction to Hear The Second Question.

By his Second Question, Appellant asks this Court to determine that the Texas Legislature intentionally violated the Fourteenth Amendment rights of Republican voters. This claim was never pleaded, never presented at an evidentiary hearing, and is not the subject of either a factual finding or a final judgment of the three-judgment court. As such, review by this Court is now precluded because of lack of jurisdiction.

A. This Court Does Not Have Jurisdiction Under 42 U.S.C. § 1973(c).

The first of two statutes upon which Appellant relies to demonstrate jurisdiction is 42 U.S.C. § 1973(c). This is the preclearance provision of the Voting Rights Act, which requires states and political subdivisions to submit voting changes to either the Attorney General or to a federal district court in Washington D.C. for review prior to implementation. Failure to obtain preclearance gives rise to a private cause of action for injunctive relief. *See, Allen v. State Board of Elections,* 393 U.S. 554, 555, 89 S.Ct. 817, 826 (1969). By express statutory provision, this case must be heard before a three-judge court and appeal is directly to the Supreme Court.

This jurisdictional basis is inapplicable to the Second Question presented by the Appellant.[6] The Second Question address the Fourteenth Amendment rights of Republican voters. Republicans are not among the minorities protected by the Voting Rights Act. 42 U.S.C. § 1973.

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[6]It is also inapplicable to First Question, which does not challenge my preclearance procedures.

B. This Court Does Not Have Jurisdiction Under 28 U.S.C. § 1253.

Appellant's alternative basis for jurisdiction is 28 U.S.C. § 1253. This is also an inadequate jurisdictional grant to support this Court's appellate review of the Second Question presented. The statute provides that any party may have direct appeal to this court from an order by a three-judge court "granting or denying ... an interlocutory or permanent injunction ..." No such order has ever been entered in this case regarding the Second Question presented. While the issue of Republican voting rights could have been presented, it was never the subject of any pleading, or any pretrial or post-trial amendment filed by Appellant. Appellant attempts to place this issue before the Court simply by including it in his Jurisdictional Statement. This cannot be done. Issues not raised below are not normally before this Court on appeal. *See, Adickes v. S.H. Kress Company,* 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1613 (1970); *Dothard v. Rawlinson,* 433 U.S. 321, 323 n.1, 97 S.Ct. 2720, 2724 (1977).

2. This Court Should Not Review the Second Question as a Matter of Policy.

Even if this Court concludes that it has jurisdiction to review the Second Question presented, it should not. To do so would violate the longstanding policy of this Court that, in the absence of exceptional circumstances, questions not passed upon below are not to be reviewed for the first time on appeal.

The ordinary practice of this Court is not to decide questions not raised or resolved in the lower courts. *Youakim v. Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976). In *Hormel v. Helvering,* 321 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... [and] in order that litigants may not be surprised on the appeal by final decision there of issues upon which they have had not opportunity to introduce evidence." *See, also, Singleton v. Wulff,* 428 U.S. 106, 120, 96 S.Ct. 2868, 2877 (1976).

On occasion, however, this Court has recognized exceptions

to this policy when, for instance, proper resolution is beyond any doubt or injustice might otherwise result. *Singleton, supra,* 428 U.S. at 121, 96 S.Ct. at 2877. However, the exceptions have been narrowly applied to allow a reviewing court to consider unarticulated legal theories applied to the *undisputed* facts of a *single cause of action.* For example, in *Allen v. State Board of Elections,* 393 U.S. 544, 554, 89 S.Ct. 817, 825 (1969), Appellants prosecuted a voting rights case before the district court on a Fourteenth Amendment theory and waited until filing their Jurisdictional Statement with this Court to raise for the first time the applicability of Section 5 of the Voting Rights Act. Because all the facts were undisputed, this Court found it to be in the interest of judicial economy to consider the legal theory that had not been considered below. In *Youakim, supra,* the Court again considered a legal theory not presented below. But, the Court clearly noted that "the statutory issue is not foreign to the subject matter of the complaint ... (and) could surely have been pursued under the complaint filed in this case." 425 U.S. at 234, 96 S.Ct. at 1401.

In contrast to these cases, Appellant now seeks to present for the first time a matter factually quite distinct from the claims litigated at trial. Instead of merely presenting another legal theory in support of his rejected claim that the Texas congressional redistricting dilutes *minority* voting strength, Plaintiff now seeks to litigate the plan's impact on a totally different group: *Republicans.* Even under the broadly permissive reach of notice pleading, this is not a claim Appellant could have pursued under the complaint filed in this case, which makes no mention of Republicans. Appellees have never received fair notice of this claim and the grounds upon which it rests. *See, Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99,103 (1957). Nor has Appellant presented any evidence on this claim, let alone presented undisputed facts upon which this Court could act. To allow Appellant to present this issue for the first time on appeal to the Supreme Court would be to reward Appellant's sandbagging and leave Appellee without even the minimal protection offered by notice pleading.

Appellant's first mention of the issues presented in the Second Question came in his Motion for Rehearing or New Trial, which was denied by the two-judge majority. *See,* Jurisdictional

Statement at D-1. Such a decision is within the sound discretion of the trial court and should not be reversed absent a finding of abuse of discretion. *See, Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. Tex. 1981).

No such abuse existed in this case. The motion was based entirely on the dissenting opinion of Judge Steger. There is no representation that there is additional evidence to be presented, that an injustice occurred in the course of trial that should be remedied, that new case law has developed, that there was a misunderstanding of applicable principles of law, or that there existed any of the other reasons for which rehearings heretofore have been granted. Pursuant to Rule 59(a) of the Federal Rules of Civil Procedure.

Moreover, Appellant—who is Texas Republican Party Chairman—had every opportunity to pursue a claim on behalf of Republicans. Nevertheless, such a claim was never presented, nor was it the subject of any attempt to amend pursuant to the liberal amendment policies of Rule 15 of the Federal Rules of Civil Procedure, which, of course, allow pleadings to conform to issues actually tried by express or implied consent of the parties.

Far from establishing an abuse of discretion, the record amply demonstrates Appellant's lack of diligence, which should not now be rewarded by returning litigation that began in 1981 to its very preliminary stages.

CONCLUSION

Redistricting challenges call into question two fundamental concerns of this Court: the need for the electoral system to operate free from any and all aspersions about its integrity and the need to guarantee that all groups have equal access to the system. The intensive scrutiny focused on the Texas Legislature's congressional redistricting plan has met both these needs. To allow appellant to call the integrity of the electoral system back into question by simply asserting a preference for a particular redistricting plan without challenging either the accuracy of the factual findings or proper application of the law by the Court below is to thrust this Court unnecessarily into

the political thicket. Appellant has had his day in Court and is entitled to another only if he can demonstrate legal or factual error in the ruling below. The Jurisdictional Statement filed by Appellant fails to do this. Therefore, this Court should dismiss this appeal for lack of jurisdiction, and, in the alternative, affirm the decision of the Court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1984, to all counsel of record as of this date.

DAVID R. RICHARDS

APPENDIX A

September 27, 1983

Honorable John W. Fainter, Jr.
Secretary of State of Texas
Elections Division
P.O. Box 12887
Austin, Texas 78711

Dear Mr. Secretary:

This is in reference to the reapportionment of congressional districts (Senate Bill No. 480 (1983)) in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Acts of 1965, as amended, 42 U.S.C. 1973c. We received your submission on July 29, 1983. Although we noted your request for expedited consideration, we have been unable to respond until this time.

S.B. 480 was passed following an objection by this office to certain limited aspects of the original plan, S.B.1. Following that objection an interim plan was adopted by the Court in *Upham, et al. v. Seamon*, 536 F.Supp. 931 (1982) which addressed not only the two districts specified as objectionable by this office (Nos. 15 and 27), but also modified the plan in Dallas County changing the configuration of Districts 5 and 24 so that each contained approximately 30% minority concentrations rather than 12.1 and 63.8 per cent respectively, as adopted by the legislature. On appeal the Supreme Court found that S.B.1 in the Dallas area "failed to meet the test of racial fairness for a court-ordered plan" but summarily reversed because the case presented no finding of a violation of the law or constitution that would permit the court to supplant the legislative judgments reflected in S.B.1. The Supreme Court did, however, permit the District Court to decide whether the election schedule was so far advanced as to require the 1982 elections to be *Seamon*, 456 U.S. 37 (1982). On remand the District Court concluded that the election should be conducted under its modified plan. See *Upham, supra*, 536 F. Supp. at 1030 (E.D. Tex.))1982). The legislature subsequently met and in most

respects adopted the court's interim plan as its own in S.B.480.

In measuring whether S.B.480 satisfies the requirements of the Voting Rights Act, we have carefully considered the above history and the Supreme Court's clear pronouncement in *Upham, supra* and elsewhere (see *White v. Weiser,* 412 U.S. 783 (1973); *Wise v. Lipscomb,* 437 U.S. 535 (1978)) that deference should be paid to legislative judgment absent "any finding of a constitutional or statutory violation" (*Upham, supra* at 40). The Texas legislature made such a judgment and one that was fully informed by the experience of conducting an election under the interim plan.

The question of whether minority voters are prejudiced by a plan in which they have a substantial proportion of the vote in two districts rather than a majority in one and minimal representation in the other is a complex one. It turns on an analysis of racial bloc voting, the extent minorities participate in political coalitions with majority race citizens and the purpose of the legislature in enacting the plan. In this case minority contacts are split about their view of the plan. Some argue that it affords them a "swing vote" in each district to elect favored candidates. Others argue that fairness demands one minority district with a clear majority.

Our analysis is that minorities in Dallas County have participated freely and sometimes decisively in congressional elections. They have participated in coalitions with others of similar persuasions. In fact, that appears to have occurred in last year's congressional election in Dallas. We have found no evidence that legislative judgment was infected by a racial or ethnic motive. Nor are we able to conclude that S.B.480, when compared — as the law requires (*Beer v. United States*, 425 U.S. 130 (1976)) — with the Congressional districts drawn in 1973, is in any meaningful respect retrogressive. Accordingly, the state has met the burden imposed by the Voting Rights Act with respect to the Dallas districts.

Similarly, the other aspects of the plan satisfy the Act. Overall minorities now have six districts in which they will be able to elect candidates of their choice compared to five under the interim plan and S.B.1. Our objection to the configuration

of Districts 15 and 27 has also been resolved by S.B.480.

Accordingly, the Attorney General does not interpose any objection to the plan here under submission. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

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Civil Rights Division